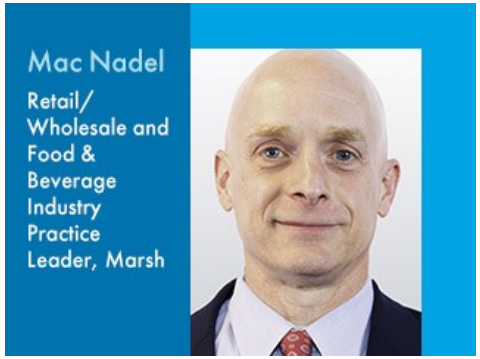
CHALLENGES TO THE JOINT EMPLOYER STANDARD:
WHAT IT MEANS FOR FRANCHISORS & FRANCHISEES

MARSH | AIG

CHALLENGES TO THE JOINT EMPLOYER STANDARD:
WHAT IT MEANS FOR FRANCHISORS & FRANCHISEES

• **Welcome and Introductions**	*Mac Nadel, Retail/Wholesale, Food & Beverage Practice Leader, Marsh*
• **Ruling by the NLRB**	*Wendy Mellk, Partner, Jackson Lewis, P.C.*
• **Employment Practices Liability Implications**	*Lara Bruzzese, Senior Vice President, AIG*
• **Wage & Hour Risk Transfer**	*Kelly Thoerig, Senior Vice President, Marsh*
• **Questions & Answers**	*Julie Eichenseer, Real Estate, Hospitality & Leisure Leader, AIG*

Introduction
Today's Speakers



MAC D. NADEL
Retail/Wholesale, Food & Beverage Practice Leader, Marsh
+1 203 229 6674
Mac.d.nadel@marsh.com

- Experience spanning a range of additional industries including both risk management and middle market clients.
- Speaker at various industry risk management conferences.
- Named "power broker" by *Risk and Insurance* magazine.

JULIE EICHENSEER
Real Estate, Hospitality & Leisure Leader, AIG
+1 312 655 8024
Julie.Eichenseer@aig.com

- AIG Chicago Managing Director, February 2014 – March 2016.
- AIG VP of Distribution, Midwest Zone, 2008 – 2016.
- AIG Business Development Manager, 2005 – 2008.
- Marsh Casualty Broker, Chicago and London, 2002 – 2005.
- MBA, Kellogg School of Management, Northwestern University

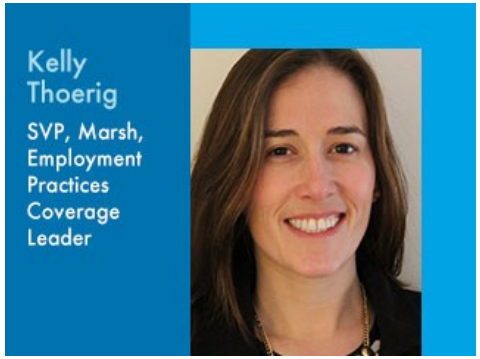
WENDY MELLK
Principal
Jackson Lewis, P.C.
+1 212 545 4073
MellkW@jacksonlewis.com

- Concentrates on employment litigation defending and counseling employers on a full range of workplace issues.
- Practice includes the defense of -employers in single and multi-plaintiff actions, nationwide class and collective action lawsuits under federal and state wage-and-hour laws.
- Frequently participates in employment law related symposia and events as a subject matter expert and advisor.

Introduction
Today's Speakers

LARA BRUZZESE
Senior Vice President
AIG Financial Lines
+1 646 857 2366
Lara.Bruzzese@aig.com

- Focuses on the EPLI book of business including strategies, coverages , pricing and client relationships for insureds worldwide.
- Named Advisen's premiere "2015 Executive Risk Awards Industry Person of the Year – US EPLI."
- Released first Wage and Hour Insurance Policy, the WHEdgeSM , available in the U.S.



KELLY THOERIG
Senior Vice President
Marsh FINPRO Practice
+1 202 263 6720
Kelly.Thoerig@marsh.com

- Primarily responsible for Manu scripting EPL policies, leading policy and insurer new product reviews, and drafting endorsements.
- Also a claims advocate for Marsh's FINPRO practice, specializing in complex coverage and claims issues concerning employment practices liability, directors and officers, professional liability, cyber, and fiduciary liability insurance.
- Former practicing insurance coverage attorney.

The Joint Employer Standard – So, Where Are We Today – And, What Should We Be Doing?

Wendy Mellk, Jackson Lewis, P.C.

Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (August 27, 2015)

- Prior Joint Employer Standard:
  - Where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment."
  - Control must be "direct and immediate" (i.e. hiring, firing, supervision, and direction).

Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (August 27, 2015)

- New "modified" Joint Employer Standard:
  - Whether a common law employment relationship exists.
  - Whether the potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."

- Control under the new standard can be:
  - **Direct**.
  - **Indirect**.
  - Or even a **reserved right to control**, whether or not that right is ever excised.

Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (August 27, 2015)

- Possible indicators of Joint Employer Status:
  - Controlling the number of employees needed for job or task.
  - Safety, production, work rules, and standards.
  - Determining job duties.
  - Instruction relating to the means and manner to accomplish a job.
  - Indirectly controlling employees' wages through a commercial agreement.
  - Retaining the right to terminate the relationship.

McDonald's USA, LLC, a joint employer et al., NLRB Case No. 02-CA-093893

NLRB filed charges against individually owned McDonald's franchises and McDonalds USA, LLC as a "joint employer."

- Underlying charges arose from unfair labor practices alleging that workers' rights were violated when they were disciplined for engaging in minimum wage protests

McDonald's USA, LLC, a joint employer et al., NLRB Case No. 02-CA-093893

- NLRB charged McDonalds claiming that "through its franchise relationship and its use of tools, resources and technology, [McDonald's] engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees…"
- Further, the NLRB claims McDonald's "nationwide response" to fast food protests justifies its inclusion as a joint employer.
- The complaints stated that McDonald's "possessed and/or exercised control over the labor relations policies or practices" of its franchisee's employees, and "has been a joint employer" of the employees.
- McDonald's (and franchisee's) response:
  - No exercise over terms and conditions of franchisee employees or personnel decisions.
  - While McDonald's may provide the "cookbook," the franchisees make their own decisions on employment issues.
- Trial is ongoing and a decision will likely be years away.

Joint Employer Liability Regulated by the DOL

- On January 20, 2016, the Department of Labor's Wage and Hour Division issued an Administrator's Interpretation (AI) on joint employment under the Fair Labor Standards Act (FLSA).
- Joint employment relationships should be defined "expansively":
  - Horizontal Employment: If employee works for two employers who are associated or related in some way with respect to an employee.
    - Example: A waitress working for two restaurants: Although the restaurants may be separate entities, they could be joint employers of the waitress if they share economic ties and have same management.
  - Vertical Employment: An employee's employer is an intermediary or otherwise provides labor to another employer.
    - Example: A business that contracts with a staffing company to provide it with temporary labor may be a joint employer of the employees supplied to it by the staffing company.

January 2016 AI

- DOL's goal to protect workers in "fissured workplaces" where more than one business is involved in work being performed.
- AI highlights DOL priority is holding larger businesses responsible for the violations of smaller business partners.
- AI notes that the DOL has encountered "fissured" employment scenarios in all industries, but makes specific mention of the following:
  - Construction.
  - Agriculture.
  - Janitorial.
  - Warehouse and logistics.
  - Staffing and hospitality.
- Potential costs:
  - Wage and overtime liability.
  - Liquidated damages.
  - Worker's attorneys' fees.

Why Does the AI Matter?

- Trend of expanding FLSA coverage to hold “lead businesses” liable for “intermediary” employers’ FLSA violations, such as tip credit violations, misclassification (exempt and independent contractors), off-the-clock claims, and meal-and-rest claims
  - Many ordinary business relationships potentially could be impacted: supplier-user (staffing companies); franchisor-franchisee, parent-subsidiary, contractor-subcontractor, predecessor-successor
  - Potentially enormous implications for lead businesses
  - Instant impact in DOL investigations
  - Signal to the plaintiffs’ bar to name more “lead businesses” as defendants

Minimizing Joint Employer Liability

- Have a clear understanding between the parties on how the relationship will work:
  - Supervision and control.
  - Training.
  - Safety.
  - Complaint handling.
  - Employment policies.
  - Employment decisions.
- Memorialize understanding in a contract.
- Provide workers with written acknowledgement of relationship between the parties.
- Ensure that agreements with contractors supports the fact that you are not a joint employer; and ensure that the practice is consistent with the agreement.
- One end of the continuum is to give the contractor complete control, and evaluate contractor's performance.
- On the other end of the continuum is to eliminate the contractor entirely and directly employ those working at the facility.
- Conduct privileged analysis on risk/reward of "shoring up" joint employment factors or changing nature of relationship

Minimizing Joint Employer Liability

- Some terms to consider for the contractor agreement:
  - Company B's employees are solely employed by Company B; the parties do not intend to create a joint employer relationship.
  - Recite that Company B alone retains the sole right to…and then include a list of employment decisions…such as hire its employees, determine their wages and benefits, assign, schedule, train, discipline, and terminate its employees.
  - Include a statement that Company A shall not and does not have the right to ….and then include all of the rights Company B alone has in this list.
  - Ensure that Company B has its own employment policies and procedures. You can review them as part of due diligence when deciding whether to enter into or renew your contract with them.
  - To the extent Company A concludes that it must exercise *some* control over the operation, minimize it to the extent possible and realize that any control, or right to control, that you retain may be used against you to support a finding that you are a joint employer.

Minimizing Joint Employer Liability

- Maintain separate human resources, payroll, and business functions.
- Maintain separate lines of supervision and avoid direct control of employees of vendors or contractors.
- Do not comingle equipment and resources between the principal employer and contractor unless all of the exchanges of such are clearly accounted for in some business fashion.
- Separate brands and trade names.
- Maintain confidentiality of trade secrets and bidding information.
- Separate union and nonunion workers for each company.
- Bring the work in-house.

- Accept possibility of joint employment and vet your joint employer:
  - Wage and hour.
  - EEOC.
  - OSHA.
  - NLRB.

Minimizing Joint Employer Liability

- Determine whether risks addressable through indemnification or other avenues.
- Consider requiring Company B to indemnify Company A for any costs incurred in opposing a joint employer claim.
  - Include indemnification language that Company B will cooperate with you in presenting your defense to the joint employer claim by:
    - Making available management representatives to prepare for hearings and to testify at hearings.
    - Providing documents reasonably requested by Company A relating to this issue.
  - Should Company B reimburse Company A's representative for the cost of bargaining?

Okay, So What Does This Mean From an Employment Practices Liability Perspective?

Lara Bruzzese, AIG

Joint Employer Liability and the EPLI Policy

- Expanded liability can have implications for the franchisor's EPLI policy.
- EPLI premiums are based are several factors, including number of employees —more employees means higher premiums.
  - With uncertainty over which test will be used to establish joint employer liability, a franchisor's premiums may be increased due to the increased risk of joint employer liability the franchisor will face from its franchisees.

- Franchisors were once not exposed to the risk of unfair business practices of their franchisees. However, evolving joint-employment laws and the questioning of control leads to discussion of:
  - The need to buy an EPLI policy.
  - Securing additional limits on their EPLI policies.
  - In some cases, facing the risk that insurance companies taking the position of not providing EPLI policies to those industries with increased franchisee exposure.

Joint Employer Liability and the EPLI Policy

- If court decisions result in more findings of a joint employer relationship, there will be a corresponding increase in exposure which will have to be addressed through the underwriting process and review.

Underwriting Questions

- Does contractual indemnity exist between the franchisor and its franchisees?
- Are any franchisees doing business in Michigan, Wisconsin, Texas, Louisiana, Tennessee, or any other state where their employees are considered by statute to be solely employees of the franchisee unless otherwise stated in the franchise agreement?
- Does the franchisee have its own policy/system as it relates to employee payroll, training and job opportunities?
- What is the employment structure of employees working at a job site that has more than one employer?
- Has an audit been conducted to:
  - Determine whether you can be deemed a joint employer?
  - Confirm employees are properly classified?
  - Determine whether you are in compliance with federal and state wage and hour laws (If you are using a contractor/other employer)?

“Wage & Hour” Claims – Increasing Incidents and Costs, But There is an Answer!

Kelly Thoerig, Marsh

Wage and Hour Exposures

- Wage and hour claims, typically brought under the FLSA, were the single largest employment practices-related exposure in 2015.
  - In calendar year 2015, 8,954 FLSA lawsuits were filed – an **11% increase** from the 8,066 filed in 2014 and 340% increase from the 2,035 filed in 2002.
  - The top 10 private settlements in 2015 totaled **$463.6 million** — more than DOUBLE the top 10 total of $215.3 million in 2014.
  - These numbers do not include defense costs, state claims, or claims brought by the DOL.

- The DOL rule regarding salary and compensation levels needed for so-called “white collar” workers to be “exempt” from overtime pay was recently revised.
  - Standard salary level was more than doubled, from $455 per week ($23,660 annually) to $913 per week ($47,476 annually).
- The number of filings is only expected to increase over the next few years, with no crest in sight.

Wage and Hour Exposures

- The DOL's Wage and Hour Division (WHD) maintained increased enforcement, recovering more than $246 million in back wages for more than 240,000 workers (as compared to $173 million in FY2009).
- Targeted industries include:
  - Retail.
  - Construction.
  - Health care.
  - Financial services.
  - Staffing agencies.

Wage and Hour Insurance — What Does it Cover?

Definition of **Claim**

- Includes claims brought by the DOL, as well as employees or independent contractors.

Definition of **Wage and Hour Practices Liability**

- Misclassifying an Employee as an independent contractor, or as exempt rather than non-exempt.
- Miscalculating the overtime rate of pay.
- Failing to pay wages, partially or fully, for shift start or shift end, or other “off-the-clock” activities such as booting and logging on to work computers.
- Failing to pay wages, partially or fully, for “donning and doffing” activities.
- Failing to provide required meal and rest periods.
- Failing to compensate partially or fully for work-related travel times.
- Failing to maintain or keep accurate records relating to wages earned or hours worked.

Definition of **Loss**

- Includes wages and liquidated damages, defense costs, plaintiff’s attorney’s fees.
- Some forms also cover civil monetary penalties or statutory penalties.

Wage and Hour Insurance — What Does it Cover?

Selected Exclusions

- Prior knowledge of claims by insured's legal, HR, or risk management departments.
- Loss amounts attributable to criminal violation if established by final adjudication in underlying action (severability will apply).
- Traditional EPL claims.
- OSHA, workers compensation, unemployment benefits, Workers' Adjustment Retraining and Notification Act ("WARN"), NRLA, etc.
- Bodily injury.
- ERISA and other benefits laws.
- Contractual liability.

A Numerical Example

- 50 employees improperly classified as exempt from overtime
- Average unpaid overtime of $4,000 per employee per year
- Three years of back pay as result of willful FLSA violation

Penalties and Costs	***Amount***
• $4,000 x 50 employees x 3 years = $600,000 x 2 (liquidated damages)	$1,200,000
• $1,100 x 72 pay periods x 50 employees (CMPs)	$3,960,000
• Attorneys' fees, administrative costs, defense costs	$1,000,000+
• ***Total cost of noncompliance***	***$6,160,000+***

Wage and Hour Insurance Market Update

- In the past few months, the market has seen new entrants from both the US and London, to complement the Bermuda W&H primary products that have been available for the last three years.

- Beazley Syndicate in London formally released its W&H Insurance policy in September of 2015.
  - $5 million in capacity.
  - Will consider a blend with EPL.
  - Will provide as part of excess layer with “drop down” structure over EPL insurance program.
  - Retentions as low as $250,000 (geared to companies with less than 10,000 employees).

- StartPoint in London considers excess W&H Insurance and also has $5 million in capacity.

Wage and Hour Insurance Market Update

- AIG released its primary W&H Insurance form in September 2015.
  - First domestic market to offer a standalone policy.
  - $25 million in capacity.
  - Minimum retention is $5 million.
  - Will consider a blend with EPL insurance.

- XL Bermuda released a combined EPL and W&H Insurance form in December 2015.
  - Provides a streamlined option for clients that want a blended program.

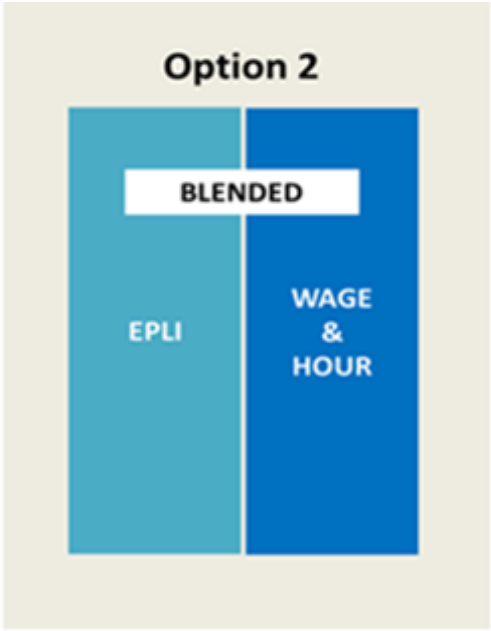
- There is considerable excess capacity available, especially in the Bermuda marketplace.

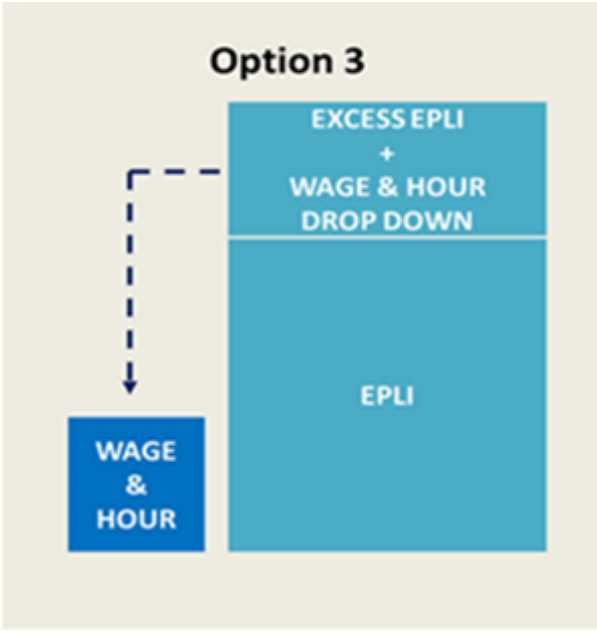
Wage and Hour Insurance Market Update

- Submission and quote activity is on the rise.
- More companies budgeted for and purchased wage and hour insurance in 2015 than in prior years.
- Considerations for franchisors-franchisees:
  - More than 25% of Marsh W&H placements to date have been in the retail/wholesale/food and beverage sector.
  - Historically, the most common industries targeted by plaintiffs in W&H claims include financial institutions, retail, and food & food services.
  - Of total wage and hour settlement spending in 2014 and 2015:
    - Retail accounted for 19%.
    - Food & food services accounted for 17%.
  - Majority of cases against retail and food & food services were for unpaid overtime.
  - Other frequent claims:
    - Misclassification.
    - Donning and doffing.
    - Missed meals and breaks.
    - Off the clock work.

Wage and Hour Insurance Market Update

- Looking forward, we expect a continuation of underwriting flexibility in coverage and program structure.
- Underwriters are generally willing to provide primary W&H coverage:
  - On a standalone basis.
  - On a blended basis with primary EPL insurance.
  - In an excess blended layer in an EPL insurance program, with a W&H drop down feature.





Wage and Hour Insurance — Underwriting Process

Initial Underwriting Information Necessary for Non-Binding Indication

- Detailed headcount information, i.e. breakdown by state of:
  - Full-time.
  - Part-time.
  - Exempt.
  - Non-exempt.
  - Union.
  - Independent contractors.
  - Temporary.
  - Leased employees, etc.
- Five-year claims summary.
- Three-year staff turnover % (Beazley).

Full Underwriting Information

- Application including warranty.
- Copy of written company policies relating to wage and hour, employee use of mobile phones.
- Wage and hour compliance documentation and internal training programs.
- Copies of wage and hour audits (internal and/or external).
- Job descriptions (including reclassifications) .
- Policies relating to IT classifications and exemption status.
- Payroll and timekeeping practices, policies and procedures.
- Policies relating to independent contractors, consultants, and/or temporary workers.
- Detailed claims history.

Okay, Sounds Good, But I’ve Got Some Questions…

Julie Eichenseer, AIG

Thank You!

American International Group, Inc. (AIG) is a leading international insurance organization serving customers in more than 130 countries and jurisdictions. AIG companies serve commercial, institutional, and individual customers through one of the most extensive worldwide property-casualty networks of any insurer. In addition, AIG companies are leading providers of life insurance and retirement services in the United States. AIG common stock is listed on the New York Stock Exchange and the Tokyo Stock Exchange.

Additional information about AIG can be found at www.aig.com | YouTube: www.youtube.com/aig | Twitter: @AIGInsurance | LinkedIn: http://www.linkedin.com/company/aig

AIG is the marketing name for the worldwide property-casualty, life and retirement, and general insurance operations of American International Group, Inc. For additional information, please visit our website at www.aig.com. All products and services are written or provided by subsidiaries or affiliates of American International Group, Inc. Products or services may not be available in all countries, and coverage is subject to actual policy language. Non-insurance products and services may be provided by independent third parties. Certain property-casualty coverages may be provided by a surplus lines insurer. Surplus lines insurers do not generally participate in state guaranty funds, and insureds are therefore not protected by such funds.

The materials, presentation and comments by the persons giving this presentation are for general educational and informational purposes only and are not intended to be legal advice. The facts and circumstances of each case differ as may the application of the concepts presented here to any such case. The advice of a professional insurance broker and counsel should always be obtained before purchasing any insurance product or service. The information contained herein has been compiled from sources believed to be reliable. No warranty, guarantee, or representation, either expressed or implied, is made as to the correctness or sufficiency of any representation contained herein.

Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman. This document and any recommendations, analysis, or advice provided by Marsh (collectively, the “Marsh Analysis” are not intended to be taken as advice regarding any individual situation and should not be relied upon as such. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, tax, accounting, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. Marsh makes no representation or warranty concerning the application of policy wording or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. Although Marsh may provide advice and recommendations, all decisions regarding the amount, type or terms of coverage are the ultimate responsibility of the insurance purchaser, who must decide on the specific coverage that is appropriate to its particular circumstances and financial position.